Sneller Verbatim/HVR

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR1549/02

Date heard: 27/03/03

Date delivered: 27/03/03

In the matter between
DOS SANTOS GIL, ALFREDO JULIO MATOS

Applicant

and

KHUENE NAGEL SA (PTY) LTD First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Second Respondent

SICELO MTHETHWA N.O. Third Respondent

J U D G M E N T

PILLAY J: This is an application to review and set aside the ruling of the third respondent commissioner who refused to condone the late referral for conciliation.

The applicant alleged that he was dismissed on 30 April 2002. The referral to the CCMA was received on 5 July 2002. That, the commissioner calculated to be 35 days outside of the stipulated 30

day time limit for such referrals.

The commissioner found that there was insufficient information before him to make a finding on the prospects of success. The crux of the commissioner's reasons for refusing the condonation is as follows:

> "The applicant has failed to give a proper explanation regarding the delay in referring the matter immediately after his dismissal. The Labour Appeal Court has held that where the reasons for the delay are unacceptable, this in itself would justify the refusal to grant condonation...."

The explanation for the delay given to the commissioner in the application for condonation was that the applicant had engaged the first respondent in settlement discussions. In the referral form under the heading “Reasons for Lateness” the applicant stated as follows:

"The reason/s that applicant referred the matter late is applicant was attempting to negotiate settlement with the respondent and put proceedings proceedings on pending. "

The applicant gave no further details as to when such communications with the respondent took place. No dates were provided in that regard in the referral.

In this application for review it appears that the applicant made no attempt to contact the respondent until about 9 May 2002. However, that information was not part of the application for

condonation before the Commissioner.
In the absence of sufficient details relating to the settlement the commissioner was entitled to come to the conclusion that he did.
The commissioner further found that in a letter dated 29 May addressed to the director of the first respondent the applicant indicated for the first time that he was prepared to settle the dispute. The commissioner had no information that there were negotiations before 29 May.
On the information before the commissioner it appears that the applicant only took steps to challenge his dismissal on 29 May 2002.
The commissioner appears to have rejected the explanation on the further grounds submitted by the first respondent namely, that the applicant had not engaged it in settlement negotiations and that the applicant was not its employee.
In reviewing his ruling the court is required to consider what information was before the commissioner at the time. It is not based on information that the court now has.
The affidavit launching the application for condonation does not make out a full case. The applicant states in this review that he was not aware of the first respondent's attitude as he had not received the letter dated 3 June 2002, which appears at page 40 of the bundle. That letter informed the applicant's representative namely, M L Consultants that the first respondent denied that the applicant was employed by it, that it dismissed the applicant and that the applicant was owed any money.
The applicant's representative replied to that letter on 10 June 2002. When the applicant applied for condonation on 4 July 2002 he made no reference to that letter. Nor did he provide any explanation or response to the first respondent’s stance.
The probability of the applicant not being aware of the first respondent’s denial of the existence of an employment relationship and that he was dismissed are remote. If I were to accept the submission made on his behalf that he was not so aware then I must also accept that the representative put his case to the first respondent without having consulted the applicant. That is hardly likely.
However, that is not in itself destructive of the applicant's case. The applicant failed to make out a full case which set out clearly and convincingly that he was entitled to condonation.
It is submitted in this application for review that he filed a reply to the first respondent’s answering affidavit in the condonation application. Therein he made out a full case. Even though the reply was delivered three days late, the commissioner ought not to have given her ruling without having had regard to the reply. So it

was submitted.
The commissioner made his ruling on the same day on which the reply was due. There is no evidence as to time when he made his ruling, i.e. whether it was made after hours by which stage the time for filing a reply might have expired or whether it was made before that time. In any event, the fact is that the reply was only filed three days later.
Consequently the court cannot come to the conclusion that the making of the ruling on the day on which the replying affidavit was due was an irregularity.
The second submission in that regard was that the applicant ought to have been given an opportunity to seek condonation for the late filing of his reply.
The commissioner was perfectly entitled to make a ruling once the time limit for the reply had expired.

The commissioner would obviously have been *functus officio* thereafter and would not have been able to consider any application to condone the late reply, even if one had been made.

The third submission in that regard was that the new rules of the CCMA which allow the filing of a reply within seven days instead of five days should have applied.

There is no basis in law on which that submission can be sustained.
If the commissioner applied such time limits as he did according to the rule then in force then the award cannot be reviewed.
Consequently, the commissioner was not obliged to take into account material in the replying affidavit.
Counsel for the applicant urged me to hold that the commissioner ought to have called for further evidence.
The commissioner had sufficient facts to make a decision. The applicant had a duty to make out a full case in its founding affidavit not in the reply. If he failed to do so, the Commissioner cannot be faulted.
In this case the applicant also had the opportunity to seek legal and expert advice before referring the dispute to the CCMA. In all the circumstances, the application for review is dismissed with costs.

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JUDGE D PILLAY

APPEARANCES:

FOR THE APPLICANT : ADVOCATE W. DAVEL

INSTRUCTED BY : MARQUES ATTORNEYS

FOR THE RESPONDENT: DION MASHER
INSTRUCTED BY : BELL DEWAR AND HALL